

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTRYWIDE FINANCIAL)	No. 15-72700
CORPORATION, et al.,)	
Petitioners,)	NLRB No. 31-CA-072916
v.)	NLRB No. 31-CA-072918
NATIONAL LABOR RELATIONS)	
BOARD,)	
Respondent.)	
_____)	
)	
NATIONAL LABOR RELATIONS)	No. 15-73222
BOARD,)	
Petitioner,)	NLRB No. 31-CA-072916
v.)	NLRB No. 31-CA-072918
COUNTRYWIDE FINANCIAL)	
CORPORATION, et al.,)	
Respondents.)	
_____)	

**ON PETITION FOR REVIEW FROM THE DECISION OF
THE NATIONAL LABOR RELATIONS BOARD,
BOARD CASE NOS. 31-CA-072916 AND 31-CA-072918**

**REPLY BRIEF IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE
FOR PETITIONERS and CROSS-RESPONDENTS COUNTRYWIDE
FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.;
and BANK OF AMERICA CORPORATION'S**

**GREGG A. FISCH
PAUL BERKOWITZ
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067
Telephone: (310) 228-3700
Attorneys for Petitioners and Cross-Respondents**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
A. Exhibits A Through C Can Be Properly Considered By The Court Through the Judicial Notice Process.....	2
1. Contrary to the Board’s Arguments, The Documents At Issue were In Front of the Board Prior to the Order Being Issued.....	2
2. Nonetheless, It is Proper for The Court to Consider Matters Outside of the Record of the NLRB	3
B. Exhibits A through C are Properly Subject to Judicial Notice	7
C. Exhibits A through C are Relevant to Matters At Issue Here.....	8
III. CONCLUSION	10

TABLE OF AUTHORITIES

	Page(s)
<u>Federal Cases</u>	
<i>Don Lee Distrib., Inc. (Warren) v. NLRB</i> 145 F.3d 834 (6th Cir. 1998)	8
<i>Fisher v. INS</i> 79 F.3d 955 (9th Cir. 1996)	4
<i>Gafoor v. INS</i> 231 F.3d 645 (9th Cir. 2000)	5
<i>Harris v. County of Orange</i> 682 F.3d 1126 (9th Cir. 2012)	7
<i>Klahn v. Quizmark, LLC</i> 2013 WL 4605873 (N.D. Cal. Aug. 28, 2013)	8
<i>Lising v. INS</i> 124 F.3d 996 (9th Cir. 1997)	5
<i>Local 812 GIPA v. Canada Dry Bottling Co.</i> 1999 WL 301692 (S.D.N.Y. May 13, 1999)	8
<i>Lowry v. Barnhart</i> 329 F.3d 1019 (9th Cir. 2003)	4
<i>NLRB v. Fred Meyer Stores, Inc.</i> 466 Fed. Appx. 560 (9th Cir. 2012).....	5
<i>Papai v. Harbor Tug & Barge Co.</i> 67 F.3d 203 (9th Cir. 1995), <i>rev'd on other grounds</i> 520 U.S. 548 (1997).....	7
<i>Reyn's Pasta Bella, LLC v. Visa USA, Inc.</i> 442 F.3d 741 (9th Cir. 2006)	7
<i>Singh v. Ashcroft</i> 393 F.3d 903 (9th Cir. 2004)	4, 9

United States v. Aguilar
782 F.3d 1101 (9th Cir. 2015)7

United States v. Navarro
800 F.3d 1104 (9th Cir. 2015)7

United States ex rel. Robinson Rancheria Citizens
Council v. Borneo, Inc.
971 F.2d 244 (9th Cir. 1992)7

Federal Statutes, Rules, Regulations

29 U.S.C. § 153(d)3

29 U.S.C. § 160(e)6

Federal Rules of Evidence, Rule 201.....4, 7, 8

Federal Rules of Appellate Procedure, Rule 16(a)5, 6

National Labor Relations Board Rules & Regs. § 203.13

I.
INTRODUCTION

Petitioners and Cross-Respondents Countrywide Home Loans, Inc., Countrywide Financial Corporation, and Bank of America Corporation (collectively, “Petitioners”) respectfully request that the Court take judicial notice of Exhibits A through C of their Request for Judicial Notice (Docket Entry 27), because these matters are properly subject to judicial notice and can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Respondent and Cross-Petitioner National Labor Relations Board’s (“NLRB” or the “Board”) arguments to the contrary are unavailing.

Simply put, the undisputed facts contained in the referenced Exhibits can be properly considered by the Court and are subject to judicial notice here. They are relevant to the matters at issue and simply provide the Court with a complete picture of what happened in the underlying litigation, *i.e.*, they firmly establish that, after Claimants collectively pursued their claims in arbitration, they ultimately settled the case as a class action on a class-wide basis. Since there is no dispute that the requested documents properly present the facts of the matter, the Court should grant judicial notice and consider this evidence accordingly.

II. ARGUMENT

A. Exhibits A Through C Can Be Properly Considered By The Court Through the Judicial Notice Process.

1. Contrary to the Board's Arguments, The Documents At Issue were In Front of the Board Prior to the Order Being Issued.

The Board argues that “[t]he Court should reject all three documents [Exhibits A-C], because they are not part of the record before the Court and were not part of the record before the Board.” (Docket Entry 39, Opposition, p. 2.) The Board further contends that Petitioners “providing the documents to the Regional Director did not place those records before the Board for its consideration and did not make them part of the record.” Docket Entry 39, Opposition, p. 4.

Yet, the pertinent documents were in front of the Board prior to the panel majority's Order being issued. Months beforehand, when they requested that the charges be withdrawn and dismissed, Petitioners submitted **Exhibit A** (Arbitrator's Final Order and Award Granting Final Approval of Class Action Settlement) and **Exhibit B** (Court Order Confirming Arbitrator's Final Order and Award Granting Final Approval of Class Action Settlement) to the Regional Director of the Board (who acts “as the representative of [the] agency,” as confirmed in **Exhibit C**, the Letter from the NLRB denying Claimants' Request to Withdraw Charges and Dismiss the Consolidated Complaint).

In unfair labor practice cases, the General Counsel has “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints” alleging unfair labor practices. 29 U.S.C. §153(d). The General Counsel’s powers with respect to unfair labor practices are delegated in substantial part to the Board’s Regional Directors, including the authority to issue and prosecute complaints against parties alleged to have violated the Act, obtain settlements of unfair labor practice charges, and obtain compliance with rulings of administrative law judges, the Board, and courts. NLRB Rules & Regs. § 203.1. As such, each Regional Director is an agent of the Board and acts on behalf of the Board on a regular basis. Accordingly, contrary to the Board’s arguments, Petitioners’ submission of the Exhibits to the Regional Director was, in effect, them placing those documents before the Board for its consideration. Thus, Exhibit A and Exhibit B have been before the Board throughout the relevant period (and Exhibit C was a document – on NLRB letterhead – prepared and provided by the acting representative of the Board) and are undisputed facts that this Court properly can consider in this matter.

2. Nonetheless, It is Proper for The Court to Consider Matters Outside of the Record of the NLRB.

Even if the Court were to determine that the Exhibits were not properly before the Board, the Court still may consider them. Judicially noticeable matters not otherwise included in the record on appeal may, nonetheless, be considered by

the appellate court. Broadly, appellate courts have the same power as trial courts to take judicial notice of a matter properly subject to such notice. *See* Fed. R. Evid. 201; *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (acknowledging exceptions to the general rule that the Court may consider only the underlying record: “We may correct inadvertent omissions from the record . . . , *take judicial notice*, . . . and exercise inherent authority to supplement the record in extraordinary cases” (emphasis added and internal citations omitted). As this Court has stated in the past, “it is nonsense to suppose that [the court of appeal is] so cabined and confined that [it] cannot exercise the ordinary power of any court to take notice of facts that are *beyond dispute*. . . . [A]n appeals court could not function if it had to depend on proof in the record of” such facts. *Singh v. Ashcroft*, 393 F.3d 903, 905-06 (9th Cir. 2004) (emphasis added).

In support of its argument, the Board cites two cases that do not control here, neither of which requires the Court to accept the Board’s position or otherwise refuse to consider the Exhibits subject to judicial notice. One is a decision involving this Court interpreting the Immigration and Nationality Act (*Fisher v. INS*, 79 F.3d 955, 958 (9th Cir. 1996)), a statute that has completely different language from the applicable National Labor Relations Act (the “Act”) and controlling authority over that federal statute does not apply to this situation. In fact, in later decisions, the Ninth Circuit has retreated from the holding in *Fisher*,

in order to allow courts of appeal to take judicial notice of matters not in the underlying record. *See, e.g., Lising v. INS*, 124 F.3d 996, 998-99 (9th Cir. 1997) (taking judicial notice of official INS forms not contained in the administrative record); *Gafoor v. INS*, 231 F.3d 645, 655-56 (9th Cir. 2000) (taking judicial notice of developments in the proposed country of deportation that arose after the agency's decision and before appellate review).

The other cited case is an unpublished decision of this Court (*NLRB v. Fred Meyer Stores, Inc.*, 466 Fed. Appx. 560 (9th Cir. 2012)), that should not be given any precedential value. In *Fred Meyer Stores*, this Court denied the defendant's motion to supplement the record, holding that "the Board did not have the opportunity to consider the evidence with which [the defendant] seeks to supplement the record" and that "[n]either the Act nor caselaw governing enforcement actions permits us to consider such evidence." 466 Fed. Appx. at 562. But, that ruling does not go far enough to completely take into account applicable law.

Generally, the record in an action for enforcement or review of a Board order consists of the order; any findings or reports upon which the order was based; and the pleadings, evidence, and proceedings before the Board. *See* Fed. R. App. P. 16(a). That is, the record in an enforcement or review proceeding before the Court of Appeals typically is the same as the record before the agency. *Id.*

However, under Federal Rules of Appellate Procedure, Rule 16(b), parties may, by order of the court, supplement the record “to supply any omission . . . or correct a misstatement.” Further, under Section 10(e) of the Act, “[no] objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U. S. C. § 160(e). As a result, applicable law actually permits a fact-specific analysis and enables the Court to consider the requested evidence.

The Court should consider the “facts that are beyond dispute” here in the form of Exhibits A through C for the following reasons: (1) as explained in the prior Section, Petitioners submitted Exhibits A and B to the Board when they asked the Regional Director of the Board to withdraw and dismiss the charges, thereby providing the Board the opportunity to consider the evidence at that time; (2) alternatively, if the Court finds Petitioners’ submission of this information to the Board in that manner did not provide the Board the requisite opportunity to consider the evidence, the Court should nonetheless supplement the record by “supply[ing] an[] omission” and consider the undisputed evidence; and finally, (3) even if the Court decides not to “supply an[] omission,” the Court still can excuse Petitioners’ failure to present this evidence to the Board because of extraordinary circumstances, and supplement the record accordingly to include the undisputed facts as reflected in Exhibits A through C.

B. Exhibits A through C are Properly Subject to Judicial Notice.

Appellate courts, like district courts, may take judicial notice of facts not subject to reasonable dispute because those facts either are generally known within the court's territorial jurisdiction *or* can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *see Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012).

Adjudicative facts of which the Court may take judicial notice include “court filings and other matters of public record.” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n. 6 (9th Cir. 2006) (taking judicial notice of court filings); *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 207, n. 5 (9th Cir. 1995), *rev’d on other grounds*, 520 U.S. 548, (1997) (taking judicial notice of decision and order of administrative law judge); *United States v. Navarro*, 800 F.3d 1104, 1109, n. 3 (9th Cir. 2015) (taking judicial notice of unpublished district court orders). Appellate courts may take judicial notice of matters of record in other court proceedings, including those occurring during the pendency of the federal appeal. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (“we may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue”); *United States v. Aguilar*, 782 F.3d 1101, 1103, n. 1 (9th Cir. 2015) (same).

In addition, courts have found arbitration awards subject to judicial notice. *See Klahn v. Quizmark, LLC*, 2013 WL 4605873, at *1 n. 4 (N.D. Cal. Aug. 28, 2013) (“The arbitration award is a fact ‘that is not subject to reasonable dispute,’ *see* Fed. R. Evid. 201, and, as such, likewise is subject to judicial notice.”).

Finally, courts also have taken judicial notice of decisions of the Regional Director of the Board as an agency decision. *See, e.g., Don Lee Distrib., Inc. (Warren) v. NLRB*, 145 F.3d 834, 841 (6th Cir. 1998) (“we have held that it is appropriate to take judicial notice of ‘adjudicative facts’ such as agency and judicial decisions [*i.e.*, the Regional Director’s decision there], even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue”); *Local 812 GIPA v. Canada Dry Bottling Co.*, 1999 WL 301692, at *2 n. 4 (S.D.N.Y. May 13, 1999) (“The Court may take judicial notice of the ULP, the Regional Director’s determination, and the Union’s appeal thereof, notwithstanding the fact that they are not mentioned in the complaints.”).

Therefore, Exhibits A through C each is properly subject to judicial notice.

C. Exhibits A through C are Relevant to Matters At Issue Here.

Despite Claimants’ argument that “[t]he proffered documents are immaterial to this case” (Docket Entry 39, Opposition, p. 5), the Exhibits have a direct relation to matters at issue and are relevant to the purpose for which Petitioners have

proffered them. Specifically, Exhibits A through C – showing that Claimants were, in fact, able to settle their wage-and-hour claims on a class-wide basis – further demonstrate that Petitioners did not violate Claimants’ Section 7 and Section 8(a) rights under the Act, since they show that the employees actually were able to engage in concerted activity for mutual aid or protection. Notably, it already is before this Court (and all along was part of the Board record) that Claimants were able to join together to assert their claims, collectively, in their lawsuit – both in federal court and arbitration – and that they, collectively, actually filed unfair labor practice charges with the Board related to the Arbitration Agreements. *See* Docket Entry 26, Vol. 2, p. 54, *et seq.* (Joint Stipulation of Facts (NLRB Cases), and Joint Exhibits).

The additional undisputed facts, subject to judicial notice here, that Claimants were able to attain a class-wide settlement in arbitration, and that the District Court confirmed the arbitral award, simply provide information as to how the litigation process discussed in the record was completed and further clarify the entire situation at issue. Accordingly, consistent with this Court’s earlier pronouncements in *Singh*, 393 F.3d at 905-06, it would be “nonsense to suppose that [this Court is] so cabined and confined that [it] cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute.” Thus, the

Court should take judicial notice of the “facts that are beyond dispute” as reflected in Exhibits A through C, respectively.

III. CONCLUSION

Here, the Court may properly take judicial notice of Exhibits A through C since they consist of an arbitration award, a court filing, and public agency records, each of which is relevant and properly subject to judicial notice. Accordingly, Petitioners respectfully request that this Court take judicial notice of Exhibits A through C.

Dated: July 29, 2016

Respectfully submitted,
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Gregg A. Fisch*

Gregg A. Fisch

Paul Berkowitz

1901 Avenue of the Stars, Suite 1600

Los Angeles, California 90067

Telephone: 310-228-3700

Facsimile: 310-228-3701

gfisch@sheppardmullin.com

Attorneys for Petitioners

COUNTRYWIDE FINANCIAL CORPORATION;
COUNTRYWIDE HOME LOANS, INC.; and
BANK OF AMERICA CORPORATION

CERTIFICATE OF FILING AND SERVICE

I certify that on this 29th day of July, 2016, I caused this REPLY BRIEF IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE FOR PETITIONERS COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC. AND BANK OF AMERICA CORPORATION to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users properly addressed to the following:

Linda Dreeben, Deputy Associate General Counsel
Elizabeth Heaney
David Casserly
Appellate Court Branch,
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated this 29th day of July, 2016.

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Gregg A. Fisch
Gregg A. Fisch
Paul Berkowitz
Attorneys for Petitioners
COUNTRYWIDE FINANCIAL CORPORATION;
COUNTRYWIDE HOME LOANS, INC.; and
BANK OF AMERICA CORPORATION